STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
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CERTIFIED MAIL

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Re: Comments on Proposed Modification to TSD Permit and on Draft MTCA Agreed Order for Terminal 91, Seattle, Washington

Dear Messrs. DuBey, Knox, and Kilbane:

This letter responds to comments Ecology received from Philip Services Corporation ("PSC"), the Port of Seattle ("Port"), and Pacific Northern Oil Corporation ("PNO") regarding proposed modifications to the dangerous waste permit for the Terminal 91 treatment and storage facility. As you know, Ecology has proposed to modify that permit by incorporating the terms of an agreed order under the Model Toxics Control Act.

PSC urged Ecology to terminate the permit, and rely instead on the provisions of the MTCA order to ensure completion of corrective action at the site. In the alternative, PSC asked Ecology to terminate those portions of the permit that pertain to operation of the treatment and storage facility, and to substitute PNO, the current occupant of the site, for PSC as the facility "operator." PSC also argued that proposed permit condition VI.B.3. is unlawful because it would "supersede and revoke" modification procedures required by the dangerous waste rules.

The Port generally concurred with PSC's comments, but noted it was not convinced that substituting PNO for PSC as the operator of the Terminal 91 TSD facility would be appropriate.

PNO objected strongly to PSC's suggestion that the permit be modified to name PNO as the operator of the Terminal 91 TSD facility. PNO explained that it does not now engage and has not in the past engaged in any activities at this location that would require a TSD permit.

Because the letters from the Port and PNO comment not just on the proposed modification to the permit, but on the letter from PSC as well, Ecology will respond to all three comment letters together.

The dangerous waste regulations, chapter 173-303 WAC, require the owner and operator of a facility treating, storing, or disposing of dangerous waste to obtain a permit. The permit must be maintained during the operation and closure of the facility. WAC 173-303-800(2). Furthermore, the permit must be maintained throughout the post-closure period if the facility does not meet clean closure standards at the end of closure. *Id.*

In 1992, Ecology issued a TSD permit for the Terminal 91 TSD to Burlington Environmental, Inc., dba PSC (hereafter referred to as "PSC") as the operator of the facility, and to the Port as the owner. The permit specified conditions under which the TSD could be operated. It also included a plan for closing the facility, which called for the clean closure of the facility with no waste left on site. A revised closure plan was approved on October 29, 1996 that called for clean closure of only the above ground portions of the facility while deferring subsurface cleanup to the corrective action process. The closure plan noted that a post-closure permit could be required for soil and groundwater contamination not addressed during corrective action.

In March 1997, PSC submitted to Ecology a report certifying that all closure activities specified under the revised final facility closure plan are complete at the TSD. It is clear that contaminants have been left below ground at levels that exceed the standards in WAC 173-303-610(2)(b). Therefore, the site will require post-closure care if the clean closure requirements can not be met after corrective action has been completed. See WAC 173-303-610(1)(b). As explained above, facilities subject to post-closure care must be permitted.

Since there have been releases of dangerous wastes and/or dangerous constituents at the facility, corrective action is also required. At facilities that are required to have a permit, corrective action conditions "must be specified in the permit." WAC 173-303-646(2)(c).

The provisions of the dangerous waste regulations cited above make clear that the Terminal 91 TSD facility must remain permitted. Although active treatment and storage no longer occur at the facility, past operations have left contaminants on site that necessitate corrective action and, likely, post-closure care. As discussed above, the dangerous waste regulations require a permit for both of these activities.

PSC and the Port, through its concurrence with PSC's comments, have encouraged Ecology to ignore these provisions of the regulations. First, they argued, EPA has implicitly approved the use of regulatory tools other than permits to compel corrective action. See 59 Fed. Reg. at 55786 (Nov. 8, 1994). Therefore, the commenters apparently believe, EPA would not object to the state terminating the Terminal 91 TSD permit and compelling corrective action through a MTCA order.

Ecology believes that EPA made its expectations clearly known when it authorized the state's corrective action program in 1994. Several passages in the Federal Register notice in which EPA granted final authorization for this program emphasized that corrective action requirements had to be specified in a permit:

> In order to fulfill the RCRA Section 3004(u) and (v) requirement that all RCRA permits must include corrective action permit conditions, state corrective action orders will be incorporated into RCRA permits issued pursuant to the authorized State program permitting regulations.
>
> 59 Fed. Reg. 55322.
>
> Under the Washington program, a State order would be considered to be part of the authorized RCRA program only when the order is incorporated into an existing RCRA permit, or when the order is issued simultaneously with and incorporated by reference into a new RCRA permit.
>
> *Id.*

> The statutory language of section 3004(u) of RCRA also applies to "facilities seeking a permit." Such facilities include those hazardous waste management facilities which are required to obtain permits to operate and to those subject to post-closure permits. EPA has interpreted this language to mean that corrective action must be specified in operating or post-closure permits issued to such facilities.
> 59 Fed. Reg. 55323.
>
> Any orders issued to a facility under MTCA will not be considered to be part of the EPA-authorized corrective action program unless and until they are incorporated into a RCRA permit.
>
> *Id.*

The statements quoted above leave Ecology with no doubt that EPA expects the terms of any corrective action order issued in Washington to be incorporated into a RCRA permit. Accordingly, Ecology cannot assume it has EPA's implicit permission not to do so at the Terminal 91 TSD. Furthermore, Ecology is authorized to operate the corrective action program in Washington in lieu of EPA, and independently believes a RCRA permit is needed to complete corrective action at this facility.

PSC and the Port also argued that MTCA exempts from dangerous waste permitting requirements any cleanup performed under an agreed order from Ecology. RCW 70.105D.090(1) provides in pertinent part that:

> [a] person conducting a remedial action at a facility under a consent decree, order, or agreed order, and the department when it conducts a remedial action, are exempt from the procedural requirements of chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW ....

Ecology is not persuaded that this language authorizes it to terminate the existing TSD permit. As PSC notes in its comment letter, this exemption was designed for unpermitted sites. Allowing substantive requirements to be specified in a MTCA order or decree expedites the cleanup process, since liable parties do not need to apply for and await regulatory agency preparation of a permit. At sites where permits have already been issued, however, using a MTCA order or decree to compel compliance with substantive requirements would actually increase the administrative burden because it would necessitate permit termination proceedings. PSC's argument would lead to even more absurd results at sites where permits will be needed both before and after remedial action is complete. For example, it would require Ecology to

terminate, and then following completion of remedial action, to reissue an NPDES permit for a factory that discharges pollutants to surface waters as a normal part of its operations.

Furthermore, PSC's interpretation of RCW 70.105D.090(1) is inconsistent with the conditions of Ecology's corrective action authorization. As discussed above, EPA will not recognize as part of the authorized corrective action program any corrective action requirements that are not incorporated into a permit. When it adopted RCW 70.105D.090, the legislature made sure that the exemption would not apply if it resulted in "loss of approval from a federal agency necessary for the state to administer any federal law, including the federal resource conservation and recovery act." See RCW 70.105D.090(2). Even if the exemption applied to currently permitted sites, therefore, it clearly does not apply where its use will cause loss of EPA authorization for the corrective action.

For these reasons, Ecology believes that corrective action requirements for the Terminal 91 TSD facility must be specified in the permit.

In the alternative, PSC argued that the permit should be modified in two respects: first, by deleting those portions of the permit that pertain to operation of a treatment or storage facility; and second, by substituting PNO for PSC as "operator" of the facility for purposes of closure, post-closure, and corrective action.

Ecology agrees that neither PSC nor the Port currently conduct treatment or storage operations at this site. Modification of those portions of the permit that address treatment and storage operations that are no longer relevant may, therefore, be justified under WAC 173-303-830(3)(a)(i). That subsection allows permit modification when "[t]here are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit."

While Ecology agrees that modification of the treatment and storage portions of the permit may be warranted, such action is beyond the scope of this proposed permit modification. If PSC and/or the Port wish to request modification of the permit conditions related to TSD operations, either or both may do so in accordance with the procedures of WAC 173-303-830(4). The request should clearly identify those provisions of the permit that would be modified. Ecology will review any such request it receives and, after appropriate public comment, make a determination in accordance with WAC 173-303-840.

If the permit's operating conditions are modified, PSC and the Port will be left with a permit that contains only corrective action conditions and a section reserved for post-closure conditions, if needed. Although this may be unusual, it is clearly supported by law. The Environmental Appeals Board has ruled that EPA has authority to issue "corrective action only" permits to owners and operators of TSDs that have ceased active operations. In *In re: GMC Delco Remy*, RCRA Appeal No. 95-11, 1997 WL 323728 (E.P.A.) (Order Denying Review in Part and Remanding in Part) (June 2, 1997), the EAB rejected the argument that a facility needed to maintain a RCRA permit only during its active life. Instead, the EAB ruled that EPA could issue a "corrective action only" permit to a facility, even though it had certified clean closure and its state-issued TSD permit had expired. The EAB wrote in pertinent part:

> Once the owner or operator of a facility receives a permit for treating, storing or disposing of hazardous waste, it makes no sense to say that the permittee can simply unilaterally abandon ongoing corrective action responsibilities whenever it finds it expedient to discontinue the activities that prompted it to obtain a permit in the first instance. While it may be true in some cases that a permit would no longer be required for the discontinued hazardous waste management activity, the same would not necessarily be true of pending corrective action. In cases where closure of a facility's regulated units does not coincide with completion of corrective action, a permit for "corrective action only" is a logical mechanism for assuring that the facility completes the obligation it assumed as a condition of getting a permit in the first place.

Id., 1997 WL 323728, * 16-17 . The Board reached the same conclusion in *In re: Adcom Wire*, 5 E.A.D. 84, 1994 WL 36740 (E.P.A.) (Order on Reconsideration) (February 4, 1994) ("We can easily envision circumstances where the corrective action portion of a permit will continue long after the non-HSWA portion of the permit has expired"). Even if the operating portions of the Terminal 91 TSD permit are deleted in the future, therefore, the need for the corrective action portions will continue.

PSC's request that PNO be substituted for it as the TSD operator is groundless. To Ecology's knowledge, PNO does not conduct, and has not conducted, any treatment, storage, or disposal of dangerous waste at this facility. Since PNO has not engaged in any activities that would subject it to permitting requirements, Ecology sees no basis for naming it a permittee.

PSC also contended that proposed permit condition VI.B.3. is unlawful, because it would "supersede and revoke permit modification procedures required by the Dangerous Waste Regulations for many changes to corrective action requirements initiated or approved by Ecology." Proposed permit condition VI.B.3. states that:

> Approvals of amendments or changes to any plans, reports or schedules initiated or approved by the Department do not require modifications to the permit according to the three tiered modification system described in WAC 173-303-830, except for those approvals, amendments, or changes that require public notice under the MTCA regulations.

Under the corrective action provisions of the permit, PSC and the Port will be required to submit several reports, plans, and other documents, including a data investigation/data evaluation report, a feasibility study workplan and report, and if required, a draft cleanup action plan. Because their submittal is contemplated in the permit, these documents will not "modify" the permit when they are adopted. Instead, their incorporation simply will make preexisting permit obligations more specific. *See, e.g., In re: General Electric Company*, 4 E.A.D. 615, 1993 WL 130294, *6 (Remand Order) (April 13, 1993) (incorporation of interim submission, such as a RCRA Facility Investigation report or a Corrective Measures Study, was envisioned when permit was adopted, so it is considered fulfillment of permit, not modification of permit). Ecology believes proposed permit condition VI.B.3. correctly states that approvals of plans, reports, or schedules required under the permit do not require permit modification under WAC 173-303-830.

However, Ecology agrees with PSC that, as drafted, the proposed permit condition may inadvertently exempt from the permit modification procedures some changes that actually do constitute "modifications" to the permit. Rather than rewrite the condition to more carefully delineate which changes do or do not require formal permit modification, Ecology will delete this proposed condition and decide on a case-by-case basis which changes justify use of the permit modification procedures in WAC 173-303-830.

Finally, PSC stated that it would be more appropriate for a representative of the Port to serve as the PLPs' project manager under the agreed order. The Port has offered to have Sue Roth, of Roth Consulting, fill that role. Ecology will substitute Sue Roth for Mark Warner as the PLPs' project manager in the Agreed Order.

In summary, Ecology's responses to the permit modification comments are as follows:

- The provisions of the dangerous waste regulations for facilities that have left contamination on-site requires a permit for corrective action and post-closure care.
- If PSC and/or the Port request modifications to the permit conditions related to the TSD operations, either or both may do so in accordance with procedures of WAC 173-303-830(4).
- Ecology see no basis for naming PNO as a permittee, since PNO has not engaged in any TSD activities that would subject PNO to such permitting requirements.
- Ecology will delete permit condition VI.B.3. and decide on a case-by-case basis which changes justify using the permit modification procedures in WAC 173-303-830(4).

Ecology will send the final permit decision (permit modification) as specified under WAC 173-303-840(8) once the Agreed Order is signed by the PLPs and returned to Ecology. The final permit decision will become effective 30 day after the service of notice of the decision.

We hope these responses adequately address the concerns raised in your comment letters. If you have any questions call Sally Safioles at (425)649-7026 or Tanya Barnett at (360) 459-6157.

Sincerely,

Sally Safioles

Sally Safioles
Project Manager
Hazardous Waste and Toxics Reduction Program

Sincerely,

Sally Safioles
For

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Bcc: Marty Werner, Ecology-HWTR HQ
HZW Files 6.6.2.1